A

PP

v.

AZMAN ABDUL GHANI

B

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
JAMES FOONG JCA
LOW HOP BING JCA
[CIVIL APPEAL NO: N-06(B)-1-2000]

C

2 OCTOBER 2006

CRIMINAL PROCEDURE: *Appeal - Petition of appeal - Application for leave to amend by prosecution - Whether doctrine of substantial justice applicable - Courts of Judicature Act 1964, s. 56 - Criminal Procedure Code, s. 310*

D

The sessions court judge convicted and sentenced the accused for an offence punishable under s. 165 of the Penal Code. The High Court judge set aside the conviction and sentence on appeal. Dissatisfied with the High Court decision, the prosecution appealed to the Court of Appeal. Before the substantive appeal was to be heard, the prosecution made this application for leave to amend the petition of appeal to include a new para. 13 stating that the High Court judge erred in law and in fact by failing to amend the charge against the accused after a specific finding of fact.

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Held (allowing the application)
Per Low Hop Bing JCA:

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(1) For the purposes of an appeal from the High Court to the Court of Appeal, s. 56 of the Courts of Judicature Act 1964 ('CJA') is applicable. The judgment of Thomson J in *Veerasingam v. PP* which is the *locus classicus* illuminating s. 310 of the Criminal Procedure Code ('CPC') (applicable to an appeal from a subordinate court to the High Court) may be applied *mutatis mutandis* to the interpretation of s. 56 CJA. (paras 20 & 21)

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(2) The doctrine of substantial justice encompasses justice to the accused in the same way as justice to society at large on whose behalf the Public Prosecutor acts. (para 33)

I

(3) The inclusion of the new ground of appeal housed in para 13 thereof would only mean that the prosecution would be permitted to ventilate its view in this respect when the substantive appeal would be heard in this court in due course. Substantial justice would require all the issues arising from the specific finding of facts to be heard and determined in the substantive appeal. At this stage of the application, this court is neither concerned nor entitled to adjudicate on the merits of the new ground. That can only be determined at the hearing of the substantive appeal. (para 34)

(4) The discretion should be exercised in favour of the prosecution in order to ensure that a rightful conviction was upheld and a wrongful one was quashed. (para 35)

[Notice of motion allowed. Prosecution directed to file and serve amended petition of appeal on accused within 14 days of order.]

Bahasa Malaysia *translation of headnotes*

Hakim Mahkamah Sesyen telah mensabitkan tertuduh atas pertuduhan di bawah s. 165 Kanun Keseksaan dan telah menjatuhkan hukuman terhadapnya. Di rayuan, sabitan dan hukuman telah dibatalkan oleh hakim Mahkamah Tinggi. Tidak berpuas hati dengan keputusan Mahkamah Tinggi, pendakwaan merayu ke Mahkamah Rayuan. Sebelum pendengaran perkara substantif rayuan, pendakwaan membuat permohonan semasa memohon izin untuk meminda petisyen rayuan bagi memasukkan satu perenggan baru di dalamnya, iaitu perenggan 13, yang menyatakan bahawa hakim Mahkamah Tinggi telah khilaf di sisi undang-undang dan fakta apabila gagal meminda pertuduhan terhadap tertuduh ekoran suatu dapatan fakta yang spesifik.

Diputuskan (membenar rayuan)
Oleh Low Hop Bing HMR:

(1) Bagi maksud rayuan dari Mahkamah Tinggi ke Mahkamah Rayuan, s. 56 Akta Mahkamah Kehakiman 1964 ('AMK') adalah terpakai. Penghakiman Thomson H dalam *Veerasingam v. PP* yang merupakan *locus classicus* yang menjelaskan s. 310 Kanun Prosedur Jenayah ('KPJ') (terpakai bagi rayuan dari mahkamah rendah ke Mahkamah Tinggi) boleh digunapakai *mutatis mutandis* dalam mentafsirkan s. 56 AMK.

[2] Doktrin keadilan substantial meliputi keadilan kepada tertuduh sama seperti keadilan kepada masyarakat awam yang bagi pihaknya Pendakwa Raya bertindak.

[3] Kemasukan alasan rayuan baru seperti perenggan 13 hanya bermakna bahawa pendakwaan dibenarkan berhujah mengenainya apabila rayuan substantif akhirnya didengar oleh Mahkamah ini. Keadilan substantial mengkehendaki supaya kesemua isu-isu yang berbangkit dari dapatan spesifik fakta didengar dan diputuskan dalam rayuan substantif. Di peringkat permohonan ini, mahkamah ini tidak akan dan tidak berhak memutuskan atas merit alasan terbaru tersebut. Itu hanya akan diputuskan di pendengaran rayuan substantif.

[4] Budi bicara harus dilaksanakan secara yang berpihak kepada pendakwaan bagi mempastikan bahawa sabitan yang hak dikekalkan dan sabitan yang salah dibatalkan.

[Notis usul dibenarkan. Pendakwaan diarah memfail dan menyerah petisyen rayuan terpinda terhadap tertuduh dalam masa 14 hari dari tarikh perintah]

Case(s) referred to:
Anuar Othman v. PP [1991] 3 MLJ 382 HC ***(refd)***
Gurbachan Singh v. PP [1967] 2 MLJ 220 FC ***(refd)***
Innocent v. PP [1971] 1 MLJ 294 HC ***(refd)***
Ishak Hj Shaari v. PP [1997] 5 MLJ 28 HC ***(refd)***
Jumari Mohamed v. PP [1982] 1 MLJ 282 HC ***(refd)***
Lee Swee Tee v. PP [1960] 26 MLJ 161 ***(dist)***
PP v. Heng You Nang [1949] 15 MLJ 285 HC ***(dist)***
PP v. Sundaravelu [1967] 1 MLJ 79 HC ***(refd)***
PP v. Tan Kim Kang & Ors [1962] 28 MLJ 388 HC ***(dist)***
Quek Ching Kim v. REG [1956] 22 MLJ 54 ***(dist)***
Saw Yew Choy v. PP [2000] 5 CLJ 288 HC ***(refd)***
Veerasingam v. PP [1968] 24 MLJ 76 CA ***(foll)***
Yoong Hock Pin v. PP [1977] 1 MLJ 178 FC ***(dist)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 56, 66
Criminal Procedure Code, ss. 156, 159, 310
Penal Code, ss. 165, 335, 458, 459

For the prosecution - Kevin Morais (Joyce Blasius with him), DPP
For the accused/respondent - Christopher Fernando (Muhammad Faiz Fadzil with him); M/s Aris Rizal Christopher Fernando & Co

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing JCA:

Application

[1] By way of notice of motion in encl. (20a), the applicant – appellant ("the prosecution") prays for leave to amend the petition of appeal by adding to the original petition a new para. 13 which reads as follows:

> 13. Yang Arif Hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta apabila gagal membuat pindaan kepada pertuduhan setelah Yang Arif mendapati terdapat bukti-bukti yang mencukupi bahawa responden telah menerima bayaran "down payment" sebanyak RM40,316.62 (P20A) bagi kereta Mercedes Benz E280 nombor pendaftaran MAB 747 daripada SP16 iaitu Chang Kok Chuang.

[My Translation

> 13. The learned judge of the High Court erred in law and in fact by failing to effect an amendment to the charge after his Lordship has found that there was sufficient evidence that the respondent has received a down payment in the sum of RM40,316.62 (P20A) for the Mercedes Benz E280 car bearing registration No. MAB 747 from SP16 ie, Chang Kok Chuang.]

Factual Background

[2] The respondent – accused ("the accused") was charged with an offence under s. 165 of the Penal Code. The charge reads:

> Bahawa kamu pada 25 Februari 1995, jam lebih kurang 2:30 petang di Minsoon Credit Corp. (M) Sdn. Bhd., 73, Jalan Tuanku Antah, Seremban dalam Daerah Seremban dalam Negeri Sembilan semasa menjadi seorang penjawat awam iaitu Penolong Pengarah Penilaian dan Pengurusan Harta, Majlis Perbandaran Melaka Bandaraya Bersejarah telah menerima untuk diri kamu suatu benda yang bernilai iaitu sebuah kereta Mercedes Benz E280 nombor pendaftaran MAB 747 tanpa balasan daripada Chang Kok Chuang yang mana kamu mengetahui ada kena mengena dengan tugas rasmi kamu berhubung dengan Permohonan Projek Penswastaan Pembinaan Terminal Bas/Teksi dan Pusat Bandar di Semabok oleh Liga Maju Sdn. Bhd. yang

A mana kamu telah membantu dalam urusan pemprosesan permohonan berkenaan dan dengan itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 165 Kanun Keseksaan [N.M.B. (Bab 45)].

[My Translation

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That you on 25 February 1995, at about 2.30pm in Minsoon Credit Corp. (M) Sdn. Bhd., 73, Jalan Tuanku Antah, Seremban in the District of Seremban in the State of Negeri Sembilan while being a public servant, to wit, an Assistant Director of Valuation C and Asset Management, Melaka Historical Municipal Council, did receive for yourself a valuable thing, to wit, a Mercedes Benz E280 car bearing registration No. MAB 747 without consideration from Chang Kok Chuang which you knew to have connection with your official functions relating to the Application for the D Privatisation Project in the Construction of the Bus/Taxi Terminal and Town Centre in Semabok by Liga Maju Sdn. Bhd. in which you have assisted in the processing of the relevant application and that you have thereby committed an offence punishable under s. 165 of the Penal Code [FMS (Cap 45)]." ("the original E charge").

[3] He was found guilty and convicted by the Seremban Sessions Court judge and sentenced to 14 days imprisonment, in addition to a fine of RM30,000.

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[4] Dissatified with this, the accused appealed to the High Court against both conviction and sentence. The Seremban High Court allowed his appeal and set aside the conviction and sentence on the original charge ("the High Court decision").

G **[5]** However, the learned High Court judge in the course of his deliberation had also arrived at a specific finding of fact that the accused had accepted from SP16 Chang Kok Chuang a sum of RM40,316.62 by way of Bank of Commerce cheque dated 28 February 1995 without consideration as the down payment for H the said car.

[6] Dissatisfied with the High Court decision, the prosecution appealed to the Court of Appeal. Before this appeal is heard, the prosecution filed this notice of motion.

I

Substantial Justice

[7] Learned Deputy Public Prosecutor Mr. Kevin Morais, (assisted by Ms. Joyce Blasius) relied on the ground of substantial justice to support this application, adding that leave to amend would not be prejudicial to the accused. He cited the following authorities in support:

(1) Section 310 of the Criminal Procedure Code;

(2) Section 56 of the Courts of Judicature Act 1964;

(3) *Veerasingam v. PP* [1968] 24 MLJ 76 CA;

(4) *Jumari Bin Mohamed v. PP* [1982] 1 MLJ 282 HC;

(5) *Saw Yew Choy v. PP* [2000] 5 CLJ 288 HC;

(6) *Ishak Bin Hj Shaari v. PP* [1997] 5 MLJ 28 HC;

(7) *PP v. Sundaravelu* [1967] 1 MLJ 79 HC;

(8) *Innocent v. PP* [1971] 1 MLJ 294 HC; and

(9) *Anuar Bin Othman v. PP* [1991] 3 MLJ 382 HC.

[8] In response, learned defence counsel Mr. Christopher Fernando (Mr. Muhammad Faiz Fadzil with him) objected to this application and contended that in hearing the appeal from the Sessions Court to the High Court, the High Court judge was not competent to amend the original charge. Support for this proposition was sought in:

(1) *Yoong Hock Pin v. PP* [1977] 1 MLJ 178 FC;

(2) *PP v. Heng You Nang* [1949] 15 MLJ 285 HC;

(3) *Quek Ching Kim v. REG* [1956] 22 MLJ 54;

(4) *Lee Swee Tee v. PP* [1960] 26 MLJ 161; and

(5) *PP v. Tan Kim Kang & Ors* [1962] 28 MLJ 388 HC.

[9] My analysis of the above authorities cited for the accused leads me to the conclusion that they do not concern an application for leave to amend a petition of appeal.

[10] By way of elaboration, in *Yoong Hock Pin*, *supra,* the accused was charged in the Sessions Court with the offence of criminal breach of trust involving a sum of RM1,411.25 and was convicted. On appeal, his conviction was affirmed by the High Court judge who however varied the sum to RM392.21. On a reference under the then s. 66 of the Courts of Judicature Act 1964, three questions of law were reserved for decision by the then Federal Court. The answers given by Ali Ag CJ (M) did not concern any issue relating to an application for leave to amend a petition of appeal. At p. 179A-C right column, the learned Acting Chief Justice noted that the learned High Court judge had found "some doubt as to the actual sum handed over to the accused on 1 May 1972", and that the actual sum was RM392.21 which had not been banked in. The Federal Court referred to *Quek Ching Khim*, *supra,* and did not think it was competent for the learned High Court judge to amend a charge at the hearing of the appeal. In my view, this statement by the Federal Court was made in the context of the High Court judge's variation of the sum of RM1,411.25 to the sum of RM392.21. The Federal Court was not asked to consider an application for leave to amend a petition of appeal and hence this issue had never been ventilated before the Federal Court.

[11] In *Quek Ching Khim*, *supra,* Whyatt CJ (Singapore) heard an appeal from the magistrate's court, considered s. 156 of the Criminal Procedure Code, and set aside the conviction as the charge did not disclose any offence.

[12] *Quek Ching Kim*, *supra,* was followed by *Rigby J* in *Lee Swee Tee, supra,* where the charge also did not disclose any offence.

[13] *Tan Kim Kang & Ors, supra,* was an otherwise simple and straightforward case had it not been for the vacillations of the prosecution and the peculiar way it was handled by the Subordinate Courts, as lamented in the judgment of Hashim J (as he then was). The four respondents there were originally charged under s. 458 of the Penal Code, which charge was later amended, then transferred from magistrate's court to Sessions Court and so on until finally the first respondent was found guilty by the Sessions Court President on *inter alia* a charge under s. 335 of the Penal Code, totally disregarding the provisions of s. 159 of the Criminal Procedure Code regarding the right of the accused to

plead thereto. The other three respondents were acquitted and discharged. On the prosecution's appeal, the learned judge reversed the order of the Sessions Court President and directed that the four respondents be committed for trial under s. 459 of the Penal Code.

[14] The prosecution's notice of motion in *Heng You Nang, supra*, sought an order that the High Court hear further arguments and review its own judgment. The question that Spenser – Wilkinson J had to decide was whether he had the power to do so. The learned judge gave the answer in the negative and dismissed the motion.

[15] It is abundantly clear to me that the issues raised in the above authorities cited for the accused are unhelpful to him.

[16] On the other hand, *Veerasingam, supra,* cited by the prosecution is an authority of considerable relevance to the instant application. The then Court of Appeal had to determine the following points of law:

> In a criminal appeal to the High Court from the judgment, sentence or order of a Subordinate Court, what are the powers, principles and procedure that govern:
>
> (1) the grant of an extension of time to lodge a Petition of Appeal? and
>
> (2) the permitting of amendments to a Petition of Appeal by the addition of Further Grounds of Appeal or otherwise?

[17] Section 310 of the Criminal Procedure Code was considered. It reads as follows:

> Appeal specially allowed in certain cases.
>
> A Judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code, permit an appeal upon such terms and with such directions to the Magistrate and to the parties as such Judge shall consider desirable, in order that substantial justice may be done in the matter.

[18] Upon a proper construction of s. 310, Thomson CJ (later LP) who delivered the judgment of the court enunciated that:

(1) Where a person is debarred from appealing, s. 310 empowers a judge to grant him indulgence on such terms as he may consider desirable in order that substantial justice may be done in the matter;

(2) The court would not lay down any rule as to how the powers of the court under s. 310 are to be invoked, except to say that the ordinary way of doing so is clearly by notice of motion with such directions as the judge might give in terms of the section;

(3) The court would not attempt any definition of what is substantial justice beyond suggesting in this connection that substantial justice is done when a rightful conviction is upheld and a wrongful one is quashed;

(4) No attempt should be made to lay down any principle whatever, other than those found in s. 310 which governs the exercise of a judicial discretion reposed in a judge;

(5) The only fetter which s. 310 places upon the exercise of the discretion is that it shall be exercised in order that substantial justice may be done;

(6) To exercise his discretion properly, the judge must apply his mind to all the relevant material e.g.

(a) circumstances of the original trial;

(b) the original petition of appeal; and

(c) the circumstances which are urged upon him to induce him to allow any departure from or addition to that original petition of appeal;

and

(7) It is helpful for a judge to look at what has been done in some other case by some other judge, but if he does so, he must be careful to look at what that other judge has done merely as an illustration and not as laying down any judicial precedent.

[19] I would respectfully add that s. 310 applies to an application made in relation to an appeal from a Subordinate Court to the High Court.

[20] For the purposes of an appeal from the High Court to the Court of Appeal, such as the case here, a substantially equipollent provision is to be found in s. 56 of the Courts of Judicature Act 1964 ("s. 56") which merits reproduction as follows:

> 56. Appeals out of time and formal defects.
>
> The Court of Appeal may in its discretion, on the application of any person desirous of appealing who may be debarred from so doing by reason of his not having observed some formality or some requirement of this Act, permit an appeal upon such terms and with such directions as it may consider desirable in order that substantial justice may be done in the matter, and may, for the purpose, enlarge any period of time prescribed by section 51 or section 53.

[21] In the light of s. 56, I am of the view that the judgment of Thomson CJ in *Veerasingam*, *supra,* which is the *locus classicus* illuminating s. 310, may be applied *mutatis mutandis* to the interpretation of s. 56.

[22] In relation to Question (1) above ie, the grant or refusal of an extension of time to file a petition of appeal, I find it useful to analyse the authorities relating to this issue.

[23] In *Jumari Bin Mohamed, supra*, the petition of appeal had not been filed within the statutory period ie, on or before 13 October 1980. The application for extension of time was based on the following reasons:

(1) 4 and 5 October were Saturday and Sunday respectively;

(2) On 6 October, the counsel (also a state assemblyman) was engaged at the sitting of the Penang Legislative Assembly;

(3) On 9 October, the counsel was taken ill;

(4) On 13 October, the counsel attended his Kuala Lumpur office and needed time to study the notes of proceedings and grounds of judgment; and

(5) The counsel in the appeal was not the counsel at the trial.

[24] Mohamed Azmi J (later FCJ) considered all the circumstances of that particular case and, in the exercise of the discretion conferred under s. 310, dismissed the application.

[25] In *Saw Yew Choy, supra*, the application relied on the following grounds:

(1) the failure to file the petition within time was entirely the fault of the accused's former solicitor; and

(2) there were merits in the appeal, but the affidavit in support did not contain particulars.

[26] Kang Hwee Gee J dismissed the application and held that unless there are compelling reasons to do so, courts are generally reluctant to grant an enlargement of time under s. 310 in order to excuse the fault of a counsel's non-compliance with procedure.

[27] Discretion has however been exercised in favour of an extension of time eg, in *Sundaravelu, supra*, where the delay in filing the petition of appeal was the result of sending it to the police instead of to the court. Raja Azlan Shah J (now HRH the Sultan of Perak) considered it a proper case to exercise the discretion to allow the application for extension of time, adding that no hard and fast rules can be laid down, otherwise the discretion ceases to be a discretion and becomes a rule of law.

[28] *Sundaravelu, supra,* was followed in *Ishak bin Hj Shaari, supra,* where the grounds for enlargement of time under s. 310 were the inaction of the former solicitors who represented the accused in the Sessions Court in lodging the petition of appeal on time, and the cloud of uncertainty caused by a change of solicitors. Suriyadi J (now JCA) held, *inter alia,* that it would be legally wrong to curb and fetter the discretion of the judge in the exercise of his discretion under s. 310.

[29] Where the grounds of decision had been served on the accused's wife and not on the accused who was therefore unable to file the petition of appeal within ten days of the receipt thereof, Mohamed Azmi J (later FCJ) in *Innocent, supra,* allowed the application for extension of time in order that substantial justice may be done.

[30] In *Anuar bin Othman, supra,* a Singapore case, the applicant had filed his notice of appeal personally as he claimed that he had exhausted all his funds contesting the trial and could not afford

legal counsel. When he was served the notes of evidence and grounds of decision, he claimed that he did not know how to prepare the petition of appeal and did not realize that it had to be filed within ten days of receiving them. He thus did nothing further. Subsequently, he learnt that his co-accused's appeal against conviction was allowed. The applicant then applied for an extension of time to file the petition of appeal, after a delay of more than 18 months. Chan Sek Keong J (now CJ Singapore) accepted this as excusable.

[31] Regarding Question 2 ie, the permitting of amendments to a petition of appeal by the addition of further grounds, I would apply the above enunciation by Thomson CJ (later LP) in *Veerasingam, supra,* which must be read in juxtaposition with s. 56.

[32] The preponderance of authorities does demonstrate that our courts have exercised wide discretion under s. 310 above. An equally wide discretion is also available under s. 56: see *Gurbachan Singh v. PP* [1967] 2 MLJ. 220 FC.

[33] Reverting to the above factual background and in considering the crucial issue of whether to grant or refuse leave to amend the petition of appeal, it is to be noted that the doctrine of substantial justice encompasses justice to the accused in the same way as justice to society at large on whose behalf the public prosecutor acts: per Mohamed Azmi J (later FCJ) in *Jumari, supra,* at p. 284 G to H, left column.

[34] In my view, the inclusion of the new ground of appeal housed in para. 13 would only mean that the prosecution would be permitted to ventilate its view in this respect when the substantive appeal is heard in this court in due course. Substantial justice would require all the issues arising from the specific finding of facts to be heard and determined in the substantive appeal. At this stage of the application, this court is neither concerned nor entitled to adjudicate on the merits of the new ground. That can only be determined at the hearing of the substantive appeal.

[35] Having regard to all the facts and circumstances in this application, and consistent with the doctrine of substantial justice as enunciated in *Veerasingam supra*, read together with s. 310 and s. 56, I am of the view that the discretion should be exercised in favour of the applicant in order to ensure that a rightful conviction is upheld and a wrongful one is quashed.

A

Conclusion

[36] On the foregoing grounds, the notice of motion is allowed and the prosecution is directed to file and serve the amended petition of appeal on the accused within 14 days of this order.

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[37] My learned brother James Foong Cheng Yuen JCA has read this judgment in draft and has expressed his Lordship's sentiment to associate with its contents.

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